

[Cite as *Kremser v. Ohio Dept. of Transp.*, 2007-Ohio-3100.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

MARK KREMSER

Plaintiff

v.

OHIO DEPARTMENT OF
TRANSPORTATION

Defendant

Case No. 2007-01908-AD

Clerk Miles C. Durfey

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} 1) On January 24, 2007, at approximately 2:00 p.m., plaintiff, Mark Kremser, was traveling on Interstate 90, “preparing to exit the Cleveland inner-belt at the East 22nd Street exit,” when his automobile struck a large pothole causing substantial damage to the vehicle. Plaintiff pointed out that several other vehicles had previously struck the same pothole and received similar damage.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$824.83, the total cost of automotive repair incurred, plus \$875.00 for wage loss. Plaintiff asserted he sustained the damages claimed as a proximate cause of negligence on the part of defendant, Department of Transportation (DOT), in maintaining a hazardous condition on the roadway. The filing fee was paid.

{¶3} 3) Defendant denied any liability based on the fact that it had no knowledge of the damage-causing pothole prior to plaintiff’s incident and that it received no prior complaints about the pothole which it located at county milepost 16.76 on I-90 or the Cleveland Innerbelt in Cuyahoga County. Defendant stated in its investigation report that it is likely the pothole existed for only a short time before the incident.

{¶4} 4) Defendant denied receiving any calls or complaints regarding the particular pothole before plaintiff’s incident. Defendant explained that DOT employees conduct roadway inspections at least two times a month. Apparently no potholes were discovered during earlier roadway inspections.

{¶5} 5) Plaintiff filed a response insisting that defendant had knowledge of the particular pothole his vehicle struck. Plaintiff pointed out that defendant’s submitted records show potholes were patched on Interstate 90 on January 22, January 23, and January 24, 2007, between state mileposts 165.6 to 172.5. Defendant located plaintiff’s January 24, 2007, damage occurrence at approximately state milepost 172.63. Plaintiff stated, “[i]ndeed, ODOT’s very own records reflect that Defendant patched potholes in the exact area of Plaintiff’s accident on January 22, 23, and 24th.” Plaintiff contended that the fact that DOT had to effectuate numerous pothole repairs in the area in a brief time frame constitutes sufficient evidence of negligent maintenance to invoke liability.¹ Additionally,

¹ See *Carter v. Highway Department of Transportation, O.D.O.T.* (1997), 97-03280-AD; *Reese v. Dept. of Transportation* (1999), 99-05697-AD (9 pothole patching operations in two month period preceding incident); *Marble v. Ohio Department of Transportation, 2005-02681-AD, 2005-Ohio-3072* (damage-causing pothole patch deteriorated).

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plaintiff suggested that the pothole which his vehicle struck was a defect that had been previously patched by defendant and had rapidly deteriorated.

{¶6} 6) Furthermore, plaintiff asserted that defendant did not submit accurate records regarding pothole complaints on Interstate 90 in Cuyahoga County during January, 2007. Plaintiff suggested that defendant deliberately withheld records of calls and complaints about deteriorated road surfaces relevant to the instant claim. Plaintiff argued that defendant must have possessed prior knowledge of the particular pothole that was presumably a deteriorated patch.

CONCLUSIONS OF LAW

{¶7} Defendant has the duty to maintain its highways in a reasonably safe condition for the motoring public. *Knickel v. Ohio Department of Transportation* (1976), 49 Ohio App. 2d 335. However, defendant is not an insurer of the safety of its highways. See *Kniskern v. Township of Somerford* (1996), 112 Ohio App. 3d 189; *Rhodus v. Ohio Dept. of Transp.* (1990), 67 Ohio App. 3d 723.

{¶8} In order to prove a breach of the duty to maintain the highways, plaintiff must prove, by a preponderance of the evidence, that defendant had actual or constructive notice of the precise condition or defect alleged to have caused the accident. *McClellan v. ODOT* (1986), 34 Ohio App. 3d 247. Defendant is only liable for roadway conditions of which it has notice but fails to reasonably correct. *Bussard v. Dept. of Transp.* (1986), 31 Ohio Misc. 2d 1.

{¶9} Plaintiff has not produced sufficient evidence to show the length of time that the particular pothole was present on the roadway prior to the incident forming the basis of this claim. Plaintiff has not shown that defendant had actual notice of the pothole. Additionally, the trier of fact is precluded from making any inference of constructive notice, unless evidence is presented in respect to the time that the pothole appeared on the roadway. *Spires v. Ohio Highway Department* (1988), 61 Ohio Misc. 2d 262. There is no indication that defendant had constructive notice of the pothole. Plaintiff has not produced

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any evidence to infer that defendant, in a general sense, maintains its highways negligently or that defendant's acts caused the defective condition. *Herlihy v. Ohio Department of Transportation* (1999), 99-07011-AD. Size of the defect (pothole) is insufficient to show notice or duration of existence. *O'Neil v. Department of Transportation* (1988), 61 Ohio Misc. 2d 287. Plaintiff has not provided evidence to prove that the pothole which his vehicle struck had been previously patched and had rapidly deteriorated. Therefore, plaintiff's claim is denied.

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ENTRY OF ADMINISTRATIVE
DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

MILES C. DURFEY
Clerk

Entry cc:

Mark Kremser
2882 Bradley Road
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James Beasley, Director
Department of Transportation
1980 West Broad Street
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RDK/laa
4/19
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